

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

FIRST APPEAL No 1743 of 1996

with

FIRST APPEAL NO. 2864 of 1996

For Approval and Signature:

Hon'ble MR.JUSTICE B.C.PATEL and

Hon'ble MR.JUSTICE H.R.SHELAT

- =====
1. Whether Reporters of Local Papers may be allowed to see the judgements?
 2. To be referred to the Reporter or not?
 3. Whether Their Lordships wish to see the fair copy of the judgement?
 4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder?
 5. Whether it is to be circulated to the Civil Judge?

KUMUDBEN SURESHCHANDRA, DECD. THRO' HEIRS SURESHCHANDRA & 2

Versus

JAMNAGAR MUNICIPAL CORP.

Appearance:

F.A. No. 1743/96:

Mr. Suresh M. Shah for appellants
MR JR NANAVATI for Respondent No. 1

F.A. No. 2864/96:

Mr. Suresh M. Shah for appellants
MR JR NANAVATI for Respondent No. 1
Mr. Arun H Mehta for respondent No. 2

Respondent No. 3 Served.

IN BOTH THE MATTERS :-

Mr. Kamal Mehta, learned AGP, at the request of Court.

CORAM : MR.JUSTICE B.C.PATEL and

MR.JUSTICE H.R.SHELAT

Date of decision: 09/12/96

ORAL JUDGEMENT (Per Patel, J.)

The appellants have preferred these appeals against the judgment of MAC Tribunal in MAC Petitions No. 76/88 and 420/90, dismissing the claim petitions.

2. An interesting question about erection of a speed breaker, apart from negligence of moped driver, is raised by learned Advocates Mr. Shah and Mr. Nanavati, who are appearing for the appellant and respondent Jamnagar Municipal Corporation. We requested Mr. Kamal Mehta, learned Assistant Government Pleader to take instructions from the Regional Transport Officer and make his submissions.

3. Facts, concisely stated, leading to the present appeals, are as under :-

3.1 On the night of 7.10.1987, which was a full moon night, Sureshchandra Popatlal Mehta (Opponent in MAC Petition No. 76/88 and one of the claimants in MAC Petition No. 420/90) was riding on a two wheeler, known as moped, along with his wife Kumudben and two minor children. They went to a garden and thereafter to a fare and about midnight, they were returning on the said moped, which was driven by Sureshchandra Mehta. According to his evidence, the said vehicle is a two-seated vehicle. His wife was sitting on the pillion seat and their children were also carried on the moped. While they were negotiating a declivous slope, the vehicle had to pass through a speed breaker, and because of the speed breaker, the vehicle slipped and his wife fell down on the slope, sustained a head injury and became unconscious. She was immediately removed to Erwin Hospital and on examination, the Doctors declared her dead.

3.2 The appellants seem to have first preferred a Special Civil Suit, being No. 59/88, for compensation.

It also appears that on account of objections taken by the Jamnagar Municipal Corporation, the suit was withdrawn and the plaint was returned to the appellants for filing before the proper forum, and accordingly, the said plaint came to be registered as MAC Petition No. 420/90.

3.3 The appellants contended that deceased Kumudben fell down on the road, which resulted in the fatal injury. The appellants contended that Jamnagar Municipal Corporation had erected a speed breaker at the said place and there was neither any painting or 'zebra mark' on the speed breaker nor any signboard, to indicate the bump. It was also contended that there was no street light at the spot, and hence the speed breaker could not be seen during night hours. It is further contended that ultimately, the said speed breaker was removed by the Municipal Corporation after the accident, on account of the objection taken by the Police Department.

4. The Insurance Company contended that the accident is nothing but resultant effect of negligence on the part of Jamnagar Municipal Corporation, which is responsible for maintaining public roads. It was further contended that as the speed breaker was erected by the Municipal Corporation, it was the duty of the Corporation to maintain the roads properly and to place caution / signboards indicating that there is a speed breaker ahead and to keep the speed breaker painted with necessary marks so that a driver can notice the same.

Jamnagar Municipal Corporation contended that the driver of the moped was driving the vehicle negligently; He was carrying four persons on a small moped, and, therefore, the Corporation cannot be held responsible, and it cannot be said that the accident has occurred due to the speed breaker. It was further contended that the speed breaker was erected at the place in accordance with rules and regulations, and it was properly maintained and, therefore, the Corporation cannot be held to be responsible for the accident. The Municipal Corporation has also contended that the person driving the vehicle was prosecuted for an offence punishable under section 304.A of the Indian Penal Code in connection with the accident in question. Thus, the Municipal Corporation submitted that it cannot be held responsible for the accident, and therefore, no liability can be fastened on the Municipal Corporation for compensation.

5. So far as the appreciation of evidence by the Tribunal is concerned, the learned Tribunal has come to

the conclusion that the evidence led by the claimants had shown that the driver of the moped was not at all negligent in driving the vehicle, but the speed breaker itself was the cause for this accident. In arriving at that conclusion, the Tribunal has discussed evidence at length. It was found that there was no street light near the slope. While coming down from the slope, the vehicle dashed against the speed breaker. We have perused the evidence, and reading the evidence, it appears that there were no marks or 'zebra painting' on the speed breaker. The speed breaker had been newly erected and there was no municipal street light at the spot where speed breaker was erected. Evidence indicates that at some distance there was a lamp post but witness has stated that the same was not burning at that time. He stated that near Nilkanth temple, there is a lamp post and that was lighted. Even the District Superintendent of Police conveyed to the Municipal Corporation to remove the speed breaker as the same could not have been erected there. In the cross examination, a suggestion was made that on account of darkness he could not have seen the two different levels, i.e. one of the speed breaker and the other of the road, which the driver of the moped has admitted. He also admitted that there was no foot-rest and his wife had one child on her lap and the other child was sitting behind her. He also admitted that there was no handle on the rear seat. He also admitted that it was risky to drive a moped with four persons on the vehicle. He also admitted that he lost the balance on the speed breaker. The speed breaker is having 5 ft. width and 1.5 ft. height. He further admitted that had the vehicle been driven on a very slow speed, it could have passed through the speed breaker. He further admitted that near the spot of the accident there was no street light at the relevant time.

6. On behalf of the Jamnagar Municipal Corporation, one Budharji Nagjibhai Gadia is examined who stated that the Government gives grant to maintain speed breakers and speed breakers are painted thrice a year. In the cross examination, he admitted that he has no idea as to through whom the speed breaker was erected. He could not say as to who instructed to erect the speed breaker. He stated that P.W.D. Manual indicates the size of the speed breaker. He stated that he has no idea as to who has given instructions to erect the speed breaker of a particular size. He was also questioned about removal of the speed breaker upon instructions from the D.S.P. He stated that he does not remember that till this date, there is no signboard indicating the existence of a speed breaker; However he stated that he is aware that sign

board is to be erected. He has denied that there was no painting on the speed breaker. To a question put to him that nobody had instructed the Municipal Corporation to erect the speed breaker, he has stated that it is not necessary to have any instructions. He further stated that for speed breakers, there are no resolutions and the decision might have been taken by the Engineer at the relevant time while constructing the road.

7. The Tribunal held that the Corporation is solely responsible because it has failed not only in maintaining the speed breaker but it has not placed it in accordance with the traffic regulations. The Tribunal did not agree with the submissions that it is a case of composite negligence. The claim petition filed by the minors, being claim petition No. 76/88, is based on the composite negligence of the driver as well as the Municipal Corporation. However, as the Tribunal found that the accident was the result of the sole negligence of an outside agency, viz: the Municipal Corporation, the Tribunal held that the Tribunal has no jurisdiction to adjudicate the claim. After considering the income of the deceased, the Tribunal held that the total compensation works out to Rs.2,76,000/- to which a sum of Rs.20,000/is to be added as compensation on account of loss of life expectancy. Thus, the total amount awardable was found to be Rs.2,96,000/-, but as the claimants have restricted their claim to Rs.2,50,000/-, they would be entitled to get that much amount from the Jamnagar Municipal Corporation and also opponents No. 1 and 2, the driver and the insurer of the vehicle involved in the accident, holding that original opponent No.1 and 3 are responsible for this accident so far as the minor claimants are concerned.

8. In paragraph 38 of the judgment, the Tribunal has proceeded to decide the issue of quantum of compensation on the assumption that they are able to prove that the accident in which the minors lost their mother, had arisen on account of composite negligence of the opponent No.1 as well as the Municipal Corporation. As observed by us earlier, the Tribunal held that the driver of the moped was not negligent, and, therefore, dismissed the claim petitions. In paragraph 41 of the judgment, the Tribunal, with regard to the liability of the Insurance Company, negatived the contention of the Insurance company that the risk of pillion rider is not covered under the Insurance Policy, and, that the Insurance Company is not liable for compensation.

9. In these appeals, Mr. Shah, learned advocate for

the appellants, contended that the trial Court has seriously erred in relying on the decision of this Court in the case of G.S.R.T. Corporation, Ahmedabad vs. Union of India reported in AIR 1983 GUJ. 13. According to his submission, the said decision of this Court requires re-consideration by a Full Bench. Mr. Shah submitted that in the case of MINU B MEHTA vs. BALKRISHNA reported AIR 1977 SC 1248, the Court was called upon to decide the liability of owner or Insurance Company. The liability of the owner of the vehicle to compensate the victim in a vehicle accident due to the negligent driving of his servant is based on the law of tort. Regarding the negligence of the servant, the owner is made liable on the basis of vicarious liability. Before the master could be made liable, it is necessary to prove that the servant has acted during the course of his employment and that he has acted negligently. The liability in respect of death or bodily injury is to the extent of liability covered by the insurance. Therefore, if the driver had not incurred any liability in respect of death or bodily injury to any person, there is no liability of the owner and it is not intended to be covered by the insurance. The expression "liability which may be incurred by him" is meant as covering any liability arising out of the use of the vehicle. The apex Court held that a person is not liable unless he contravenes any of the duties imposed on him by common law or by the statute. In the case of a motor accident, the owner is only liable for negligence and on proof of vicarious liability for the acts of his servant. Proof of negligence is, therefore, necessary before the owner or the insurance Company could be held to be liable for the payment of compensation in a motor accident claim case.

From the above observations of the Honourable Apex Court, Mr. Shah submitted that the question involved in that case was, whether the owner can be held liable or not, and the Court held that the owner can be held liable on account of vicarious liability on proof of negligence of the act of his servant, and in such a case, proof of negligence is necessary before the owner or the Insurance Company could be held liable. According to Mr. Shah, if the vehicle is insured and there is an accident on account of fault or negligence of any other agency, it is not necessary that the vehicle driver must be negligent for bringing the case within the purview and jurisdiction of the Tribunal, and according to him, the MAC Tribunal will have jurisdiction even if the driver is not negligent.

10. Mr. Shah further submitted that section 95 of the Motor Vehicles Act of 1939 (hereinafter referred to as the Act) deals with the requirements of policies and limits of liability. This section mandates that the policy of insurance must be a policy enumerated in the section. He drew our attention to section 95 (1) (b)(i), wherein the words used are "caused by or arising out of the use of the vehicle in a public place". Mr. Shah submitted that the words "caused by" indicate a direct impact of a vehicle, and the words "arising out of the use of the vehicle" indicate that there may not be a direct impact. To illustrate this, he submitted that if a vehicle in which certain persons are sitting is parked near a pole of overhead electric line, and if on account of improper maintenance of the pole it falls on the vehicle, resulting in fatal injuries to a person sitting in the vehicle, the death can be said to have caused "arising out of the use of the vehicle".

11. A Division Bench of this Court, in the case of G.S.R.T. Corporation, Ahmedabad vs. Union of India reported in AIR 1988 GUJ 13 (supra), in paragraph 12 of the judgment, considered the judgment in the case of Minu B Mehta (supra). According to Mr. Mehta, learned counsel appearing for the Insurance Company, the Division Bench has observed as under:-

"Even though legislature in S. 110 (1) has employed the words 'accidents arising out of use of motor vehicles', it is now well settled by the decision of the highest court that such use must be 'negligent use' as the claim for compensation entertained by the Tribunal under S. 110 (1) is one on account of tortious liability of the driver of the motor vehicle".

Mr. Mehta submitted that the apex Court has nowhere used the words "negligent use". He submitted that before the Apex Court, the question was, whether the master and the Insurance Company can be held liable or not and for that he submitted that if the driver is negligent, only then master can be held liable and the Insurance Company can be held liable vicariously, and not otherwise. He drew our attention to amendment in the old M.V. Act and a decision reported in AIR 1991 SC 1769 in the case of SHIVAJI DAYANU PATIL vs. VATSCHALA UTTAM MORE and submitted that the Apex Court has interpreted the words "arising out of the use of the vehicle" used in section 92.A. It covers accident which occurs both when the vehicle is in motion and when it is stationery. The word 'used' has a wider connotation to cover the period

when the vehicle is not moving and is stationery and the use of a vehicle does not cease on account of a vehicle having been rendered immobile on account of breakdown or mechanical defect or accident. Mr. Mehta read out the judgment and submitted that the submission made by Mr. Nanavati cannot be accepted in view of the decision in the case of Shivaji Patil (supra) as it cannot be construed that the legislature would have thought it fit that a person should move from one forum to other forum for no fault liability claim and for compensation. Mr. Nanavati frankly submitted that the judgment of the Apex Court in the case of Minu B Mehta (supra) does not deal with the jurisdiction. However, looking to paragraphs 26 and 28 of the judgment of the Division Bench of this Court in the case of GSRTC vs Union of India (supra), if an accident has been caused not on account of rash and negligent driving but on account of negligence of outside agencies, the Tribunal would lose jurisdiction for passing orders against such outside agency. We reproduce below paragraph 28 of the judgment in the case of GSRTC vs Union of India (Supra):-

"So far as last type of cases are concerned on the allegations in the petition that the accident has been caused on account of composite negligence of the driver of the motor vehicle and driver of any other vehicles or outside agency application for claim would be maintainable by the Claims Tribunal but ultimately, if after hearing the parties, the tribunal comes to the conclusion that the accident has been caused not on account of the rash and negligent driving of the driver of the motor vehicle but solely on account of rashness and negligence of other person who might have driven the vehicle other than motor vehicle like railway engine, horse cart or camel cart etc. or solely on account of negligence of outside agencies, then on the said finding, the case would get out of provision of Sec. 110 (1) at that stage as the Tribunal will have to hold on facts as a consequence of its finding as aforesaid that the accident was not caused on account of any rash and negligent use of any motor vehicle. Once that consequential finding is reached, the Tribunal would lose jurisdiction for passing appropriate orders against such tort-feasor who gets outside the network of Sec.110 (1) and consequently, claim against such outsider, meaning thereby, other than driver of the motor vehicle, owner or insurance company,

will have to be dismissed as not maintainable at the stage despite the finding of the Tribunal that such outsider is 100% responsible for the accident in question."

12. Mr. Shah submitted that the proposition being canvassed by learned Advocate Mr. Nanavati that Tribunal has no jurisdiction to pass award against the Municipal Corporation must be rejected in view of the provisions of the Motor Vehicles Act itself, its amendment and the decision of the Apex Court. He submitted that in the MV Act of 1939, sections 92.A and 92.E for LIABILITY WITHOUT FAULT IN CERTAIN CASES have been inserted by enacting Motor Vehicles (Amendment) Act, 1982 (Act 47 of 1982). The purpose underlying the enactment of these provisions as indicated in the Statement of Object and Reasons appended to the Bill, is as under. (See paragraph 5 of AIR 1991 SC 1769 - Shivaji Dayanu Patil (supra):-

"There has been a rapid development of road transport during the past few years and large increase in the number of motor vehicles on the road. The incidence of road accidents by motor vehicles has reached serious proportions. During the last three years, the number of road accidents per year on the average has been around 1.45 lakhs and of these the number of fatal accidents has been around 20,000 per year. The victims of these accidents are generally pedestrians belonging to the less affluent sections of the society. The provisions of the Act as to compensation in respect of accidents can be availed of only in cases of accidents which can be proved to have taken place as a result of a wrongful act or negligence on the part of the owners or drivers of the vehicles concerned. Having regard to the nature of circumstances in which road accidents take place, in a number of cases, it is difficult to secure adequate evidence to prove negligence. Further, in what are known as 'hit-and-run' accidents, by reason of the identity of the vehicle involved in the accident not being known, the persons affected cannot prefer any claims for compensation. It is therefore considered necessary to amend the Act suitably to secure strict enforcement of road safety measures and also to make, as a measure of social justice, suitable provisions first for compensation without proof of fault or negligence on the part of the owner or driver of the vehicle, and

secondly, for compensation by way of solatium in cases in which the identity of the vehicle causing an accident is unknown".

Mr. Mehta drew our attention to Motor Vehicles Act of 1988, more particularly to section 163.A, which has been incorporated by Act 54 of 1994 w.e.f. 14.11.1994. There is a specific provision as to payment of compensation on structured formula basis. Mr. Mehta submitted that in view of increase in road accidents and use of motor vehicles, the legislature has amended the provisions. There is a mandate to have separate Tribunals to determine the claims arising out of the use of motor vehicles. According to Mr. Mehta as well as Mr. Shah, learned advocates, in a case where the claim is based on the use of a motor vehicle, the MAC Tribunal alone will have jurisdiction and such Tribunals will have to entertain the petitions.

13. Mr. Mehta further submitted that, no doubt, No Fault Liability refers to a departure from the common law principle that a claimant should establish negligence on the part of the driver of a vehicle for claiming compensation for death or bodily disablement. He further submitted that in view of the fact that if a regular suit is to be filed for claiming compensation it will take number of years to decide and when the legislature has provided the separate forum i.e. a Tribunal for deciding compensation cases arising out of use of motor vehicles, and the same being a benevolent legislation, the approach of the Court must be to ensure that the benefits and purposes underlined in such enactment is achieved. He, therefore, submitted that the term "arising out of the use of the motor vehicles" must be interpreted liberally.

14. We do not entertain the request for referring this matter to a larger Bench, as on appreciation of the evidence, we find that the driver of the moped was also negligent, while driving the moped and in not taking proper care. Mr. Nanavati also vehemently submitted that the driver was negligent. Therefore, in our opinion, the MAC Tribunal will have jurisdiction to entertain and decide the application, even in the facts and circumstances of this case.

15. It is to be borne in mind that the vehicle was a two wheeler moped, and four persons in all were riding on the vehicle, out of which two were ofcourse minors. Chapter VI of the M.V. Act provides for Control of Traffic. So far as pillion rider is concerned, section 85 is the relevant section, which reads as under :-

85. "No driver of a two wheeled motor cycle shall carry more than one person in addition to himself on the cycle and no such person shall be carried otherwise than sitting on a proper seat securely fixed to the cycle behind the driver's seat"

Thus, it is clear that on a two-wheeler, the legislature has not permitted movement of more than two persons at a time. In the instant case, we find from the admitted facts that two adults and two minors, in all four persons, were travelling on the moped in clear breach of section 85 of the Act. Section 83 of the Act provides that "no person driving a motor vehicle shall allow any person to stand or sit or anything to be placed in such a manner or position as to hamper the driver in his control of the vehicle." Thus, by permitting more than one pillion rider, the driver of the moped has committed a breach of section 85 of the Act. It goes without saying that by carrying four persons, (including the driver), the driver will not be in a position to control the vehicle, more particularly while negotiating a slope, a curve or an obstruction on the road.

16. Mr. Kamal Mehta, learned A.G.P. read out the relevant sections, but he could not point out from any section, schedule or provision for erecting a speed breaker. According to him, a speed breaker is erected with a view to slow down the speed of a vehicle, and ensure safety of others. From the evidence, it transpires that at the place of the accident there was a speed breaker having 1.5 ft. height. In the absence of any signboard indicating existence of the speed breaker, or the markings on the speed breaker, approaching driver will have no notice of existence of a speed breaker. There was no sufficient light as evidence reveals that there was no electric lighted lamp post at the relevant time. If there was enough light, one could have noticed the speed breaker. It is required to be noted that on the speed breaker, there were no painted marks or reflectors so that it could be noticed even by the headlight of the vehicle.

Mr. Kamal Mehta has taken us through the 9th Schedule to the Act, but he could not point out any signboard in that schedule for indicating existence of a speed breaker. There is a signboard to indicate "rough road", but that is not a speed breaker. All that Mr. Mehta could point out to us was a report of the Committee for prevention of road accidents, appointed vide Home

Department's Resolution No. TFC-1092-991-V dated 23rd March 1992. In the report, at two places, the following are mentioned :

"Road Geometrics: Providing bumps/speed breakers at intersection of cross roads and main road and it should be maintained properly" (see pg.50)

"Bumps should be provided in city for regulation of speed" (see pg. 52).

However, these are not laws enacted by the legislature, but it is only a report of the said Committee. There is even nothing to indicate that the report of the Committee is accepted by the Government and relevant sections or Rules are amended and incorporated in the Act/Rules.

Even in the new M.V. Act (of 1988), there are some additions in signs and instead of 'rough road' we find that the words used are 'hump or rough road', but there is nothing like a speed breaker.

Indication of rough road is to point out that the road ahead is rough or craggy. In case of a speed breaker (in the instant case) one bump is erected for the purpose of controlling speed. Even there may be 3/4 bumps, one after another in quick succession so as to make the road rough. But it is to be erected in such a way that a driver proceeding ahead gets notice in advance and the design and size, i.e. height, length and width of the bump/s should be such which may not cause undue damage to property or person. This type of design may be known as 'rough road', an artificial erection to control the speed.

Mr. Mehta could not point out either from the Act or from the Rules and Regulations any provision for erecting a speed breaker either by the Municipal Corporation or by the State. Under the circumstances, he fairly submitted that there is no law for erection of the speed breaker. If the speed breakers are erected without a scientific study, the same is likely to cause more harm or damage than expected benefit. Before erecting a speed breaker, it is necessary that there must be a scientific study about its size and design, i.e. height and width, place of erection, distance from junction, railway crossing, school, declivous slope etc. so as to ensure that it does not cause damage to the vehicle and bodily harm/injury to the persons sitting on the vehicle. Vehicles of different make have separate distance between

the front and rear wheels and have different height, and if an unscientific speed breaker is erected, it will damage the vehicle and cause hurt to the persons travelling in the vehicle, more particularly when an ambulance is carrying a serious patient for immediate treatment in a speed, such speed breakers are dangerous for such patients. In the instant case, Mr. Mehta for the Insurance Company submitted that there is no rule authorising anyone to erect the speed breaker. Therefore, it is clear that the Jamnagar Municipal Corporation has erected the speed breaker outside the purview of the law, eventhough the same may have been erected with an intention to slow down the speed of vehicles passing on that road. However, in the absence of any law permitting such erection of speed breaker, this action of the Municipal Corporation cannot be said to be legal. Section 75 of the Act provides for power to erect traffic signs and for the purpose of bringing the signs set forth in the Ninth Schedule in conformity with any International Convention relating to motor traffic to which the Central Government is for the time being a party, the Central Government may, by notification in the Official Gazette, make any addition or alteration to any such sign and on the issue of any such notification, the Ninth schedule shall be deemed to be amended accordingly. [see Sec.75 (7)]. As we do not find any notification for erection of speed breaker and consequent amendment in the M.V. Act or Rules and Schedules made thereunder, the action of erecting a bump on the part of the Jamnagar Municipal Corporation is an unauthorised act. The Corporation could not dispute that the construction of road is being looked after by its Civil Branch and roads in the municipal limits are to be maintained by the Corporation.

16. Under Chapter XIV of the Bombay Provincial Municipal Corporations Act, 1949 (BPMC Act, for short), all streets within a city are public streets. Public street is defined in the BPMC Act and reading section 203 of the Act, it is very clear that the Municipal Corporation has to construct, maintain and improve the streets. The Municipal Corporation, therefore, was under an obligation to maintain the streets in such a way so as not to cause any obstruction to the traffic, and to maintain safety. In the instant case, by erecting a speed breaker, which is not provided under any law, and that too unscientifically, the Corporation has done not only an unauthorised act, but negligent too, which has resulted in the death of the deceased.

17. Sub-section (5) of section 75 of the Act provides

that no person shall wilfully remove, alter, deface or in any way tamper with any traffic signs placed or erected under this section. Sub-section (6) of the Section 75 of the Act provides that if any person accidentally causes damage to a traffic sign as renders it useless for the purpose for which it is placed or erected under this section, he shall report the circumstances of the occurrence to a police officer or at a police station as soon as possible, and in any case, within twenty four hours of the occurrence. The purpose of giving such information is that immediate curative action can be taken so as to ensure that no hinderance is caused to the drivers of vehicles in the absence of the traffic sign. In the instant case, the erection of the speed breaker itself was not permitted by any law; and to add to its gravity, no signboard is kept to indicate existence of such a speed breaker; no markings are painted on the speed breaker and no light is provided. These ought to have been provided so that the speed breaker is made visible. If painting on the speed breaker is defaced, it is the duty of the Corporation to see that the same is painted. Thus, the Corporation, by remaining negligent in providing adequate facility, has made itself liable for the accident. If there would have been sufficient light and markings and signboard indicating the speed breaker, then it could have been said that eventhough the speed breaker is erected unauthorisedly, due care is taken by the Corporation to caution the drivers of vehicles about existence of the speed breaker. Had this been done, the Corporation could have argued that their liability is much less than that of the driver.

From the evidence it is clear that four persons were travelling on the moped for quite some time prior to reaching the spot where the speed breaker is erected and nothing happened till then, and it is only because of the speed breaker that the accident occurred. If the driver would have been cautious enough while carrying four persons, and if he would have been in a slow speed, then the accident could have been avoided. It appears that because of the slope, the speed of the vehicle must have increased. That may be a factor to be taken into consideration and even it is admitted by Sureshchandra that he was driving the moped in speed. It was expected from him when he was riding with three others to be at a slow speed, especially while approaching declivous slope. Driver has overlooked this aspect and has approached further towards the slope which was declivous, responsible for increase in speed, and thus the driver too remained negligent. When we drew Mr. Shah's attention to the aforesaid provisions of the Act and to

the facts, he could not submit that the driver of the moped was not at all negligent, more particularly when he was riding the moped in breach of the provisions of the Act, and, therefore, it can safely be said that Sureshchandra, the driver of the moped was also negligent in causing the accident. It is very clear that one who rides in contravention of duties imposed by a common law or statute would render the rider as a negligent rider.

18. The question now is: in what proportion the negligence is to be assessed. We have scanned the evidence and in view of the evidence discussed by us in detail above, we are of the view that the Municipal Corporation as well as the driver of the vehicle, both are equally negligent.

19. As we have held that the Corporation and the driver of the moped are equally negligent, we hold that the order passed on 3rd April 1996 by the M.A.C. Tribunal, Jamnagar in M.A.C. Petition No. 76/88 is required to be quashed and set aside, and is hereby quashed and set aside. We hold that the two minor applicants, Dharmeshkumar Sureshchandra Mehta and Amita Sureshchandra Mehta are entitled to recover the amount of damages jointly and severally from the opponents in the said petition. The compensation amount is assessed by the Tribunal at Rs.2,50,000/-. The same shall be paid with cost and interest at the rate of 12% from the date of filing of the MAC Petition. The beneficiaries are minors; Therefore, it would be in the interest of the minors to see that the amount, which may be realised, is deposited in a long term fixed deposit. We, therefore, direct that 50% of the decretal amount shall be deposited in a cumulative Fixed Deposit in the joint names of the minors, for a period of seven years. The remaining 50% of the decretal amount shall be deposited in a Fixed Deposit for a period of seven years and interest accruing thereon shall be permitted to be withdrawn periodically. On both the Fixed Deposits, the Bank shall not permit creation of any lien or charge for raising loans etc. We allow First Appeal No. 2864/96 accordingly. Award be drawn accordingly.

20. In view our aforesaid order allowing F.A. No. 2864/96, whereby the appellants are awarded compensation, Mr. Shah, learned advocate for the appellants, does not press F.A. No. 1743/96, which arises out of dismissal of MAC Petition No. 420/90, and seeks permission to withdraw the same. Hence, F.A. No. 1743/96 stands disposed of as not pressed and withdrawn.

21. Before parting with this judgment, we would like to say that the Corporation's contention has no merit in view of the term used in the Act i.e. "arising out of the use of the Motor vehicle". The connotation makes it clear that not only the tort feasures, i.e. the driver, owner and insurance Company of the vehicle involved in the accident are liable to pay the compensation, but also others, who are in law, under an obligation to provide adequate facility, safety devices or signs under the statute for the use of the motor vehicle are also liable to pay the compensation if failed to provide such facility. The Government, the authority in charge of Highways and local authorities, such as Municipal Corporation, Municipalities, Panchayats, and Urban Development Authorities, within their respective territorial jurisdiction, are duty bound to provide safe and motorable roads without any obstruction and with just and reasonable safety devices. If in law there is no provision for erecting a speed breaker, and if it is found that the speed of vehicles at a particular point of road is to be regulated, then a scientific study of the same keeping in mind various aspects has to be undertaken so as to make the device to reduce the speed just and reasonable, which would not result into causing more unintended harm than intended benefits. If speed breakers of a disproportionate height, size or design are erected on a road where the vehicles are likely to move in speed, the same is likely to result into heavy damages, both to the vehicles as well as to the travellers thereon. That is particularly true in case of two wheelers which are more prone to get slipped. Therefore, a scientific study of the speed breaking system is required to be undertaken.

22. We, therefore, direct the registry to forthwith forward a copy of this judgment to the State Government. The State Government shall, within a period of six months from the date of receipt of the copy of this order, do the needful in the matter, including making necessary amendments in the Act and rules so as to incorporate a proper provisions for regulating the speed including signboard and markings on the speed breakers and/or artificially made rough road. We may observe that section 138 of the M.V. Act 1988 empowers the State Government to make rules for the purpose of carrying into effect the provisions contained in Chapter VIII of the Act. Looking to various sections in Chapter VIII, it is very clear that the State is empowered to erect traffic signs, as provided in Section 116 of the Act. Looking to the entire Chapter, it appears that safety measures are provided, and, therefore, it is incumbent on the State to

make Rules in this behalf to carry out traffic regulations.

23. We feel unhappy to note that adequate measures are not taken to prevent plying two wheelers with more riders than what is permitted under the Act. Section 128 of the new M.V. Act needs to be implemented in true spirit. Learned advocates, not only as members of the bar but also as responsible, vigilant citizens have submitted that they are concerned with the life and safety of fellow citizens, and therefore, this section is required to be implemented in true spirit. We hope that the Government shall cause to ensure that this section is implemented by the concerned department in true spirit.
csm./ -----

By order passed on 13-3-97, the Honourable Judges have corrected para 22 of the judgment, and the said correction is incorporated in para 22.